No. 2728

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A REHEARING.

WILLIAM DENMAN,
DENMAN AND ARNOLD,
Of Counsel.

Filed this.....day of July, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2728

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A REHEARING.

The owners of the Virginian further urge that a rehearing be granted in this case because it appears from the face of the opinion itself;—

1. That, in finding the Virginian at fault, the judgment is based on arbitrary standards of navigation fixed by itself after the event, and has failed to recognize that in such navigation the Virginian was bound by the statutory rules (Inland Rules) as prescribed by Congress, regarding which this court has stated:

> "The purpose of the statutory rule is to insure the highest degree of safety, and strict obedience to that rule construed precisely as it reads will eliminate accidents." * * *
>
> *The Aurelia,* 183 Fed. 341.

2. That in determining the Virginian was in fault for not having sooner stopped and reversed, the court has failed to recognize the established rule that the Virginian was entitled to rely upon the assumption that the rules were being observed by the other vessel and was neither required nor permitted without positive knowledge to act upon any assumption that the navigation of the approaching vessel was in entire disregard of the statutory requirements.

> "Masters are bound to obey the rules and entitled to *rely on the assumption that they will be obeyed* and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. The Oregon, 18 Howard 570."
>
> *Belden v. Chase,* 150 U. S. 674.

3. That in holding the Virginian at fault for not having sooner stopped and reversed, the court has placed upon the Virginian as a positive obligation a burden and duty not prescribed by the rules, and not re-

quired except in situations of immediate and known danger.

> "The application of Rule 27 is restricted by its terms to situations of immediate danger. That rule applies only to exceptional cases. As said by the Supreme Court in the Oregon, 15 Sup. Ct. Rep. 804:
>
> " 'Exceptions to the rule are to be admitted with great caution and only when imperatively required by special situations of the case.'
>
> "It follows that under all ordinary circumstances a vessel discharged her full duty and obligations to another by a faithful and literal observance of these rules. In Marsden's Collisions at Sea, 6th Ed. p. 465, it is said:
>
> " 'But Article 27 applies only to cases where there is immediate danger *perfectly clear,* and the departure from the rules must be no more than is necessary.'
>
> "*Yang-Tsze Insurance Association, etc. v. Furness Withy Ltd.,* 218 Fed. 815."

4. That in determining the Virginian was at fault for not having earlier given a danger signal, the court has failed to apply its decision in *The Aurelia,* supra, that the statutory rules are to be construed precisely as they read.

In Article 18 (which contains the provisions for the so-called danger signal) Rule 9, forming the last paragraph of that Article, it distinctly states:

> "The whistle signals provided in the Rules under this Article for steam vessels meeting, passing or overtaking are never to be used except while steamers are in sight of each other."

These rules are intended for the guidance and control of those who navigate vessels, a class of men not skilled in analyzing and interpreting vague and involved in-

structions. Although the rule may possibly be susceptible of the interpretation put upon it by the learned District Judge, it certainly does not convey that meaning to the mind of the ordinary reader, as is shown by the testimony of Captain Sprague and other experienced navigators who were examined in this case. The interpretation of this rule by the court for the future guidance of navigators is, therefore, vitally important in the interests of humanity.

5. That in holding the Virginian at fault the court has overlooked the fact that the primary causative fault was that of the Strathalbyn in her complete failure to comply with the statutory requirements as to lights to be carried, as provided in Article 2, Rules (a), (b) and (c), and has totally disregarded the clearly established rule as laid down by the Supreme Court of the United States in *The Victory,* 168 U. S. 410, that under such conditions the contributing fault on the part of the Virginian must be clearly established and all doubts should be resolved in her favor.

6. That the court has apparently overlooked appellant's contention that any error if committed by the Virginian was an error in extremis for which she can not be held at fault. (*The Blue Jacket,* 144 U. S. 371; *The Delaware,* 161 U. S. 459.)

Argument.

This court has recited and apparently accepted the same facts as found by the lower court. Substantially these facts are as follows:

The steamer Strathalbyn, proceeding northward from Tacoma with her sidelights in a grossly inefficient condition and in nowise complying with Article 2, Rules (b) and (c) of the statutory requirements, and with such inefficient side lights further obscured (by stanchions used in the loading of deck cargo) to such an extent that they were not visible to a vessel approaching from directly ahead, and in entire disregard and contrary to the requirements of Article 2, Rules (b) and (c) as follows:

> "So fixed as to throw the light from right ahead to two points abaft the beam and of such a character as to be visible at a distance of at least two miles;"

and further, with her masthead light in a grossly dim and inefficient condition and in gross disregard of the requirements of Article 2, Rule (a):

> "A steam vessel when under way shall carry on or in front of the foremast * * * a bright white light so constructed * * * and of such a character as to be visible at a distance of at least five miles";

sighted two steamers, the Flyer and the Virginian, approaching on opposite courses to her own. The Flyer was making 14 knots an hour, the Virginian 11 knots and the Strathalbyn 6 knots plus. The Flyer overhauled, signaled and passed the Virginian about 200 yards to starboard. The Strathalbyn heard the passing signals exchanged. About five minutes later (at which time the Strathalbyn and the Flyer were not exceeding one mile apart), the Strathalbyn blew one whistle to the Flyer, which was answered by the latter, the vessels

passing port to port. The Virginian heard these passing signals, but her officers were unable to locate the lights of the Strathalbyn. When abeam of the Flyer, the Strathalbyn blew one whistle to the Virginian as a signal to pass port to port. The pilot and third mate of the Virginian on the bridge and the lookout heard the whistle, and assuming that it was a whistle intended for the Virginian diligent effort was made to locate the vessel giving the signal, but they were unable to see any light or make out the approaching vessel. The engines of the Virginian were stopped, and upon hearing a second signal blast of the approaching vessel, but being still unable to see any lights, it is testified that the engines of the Virginian were reversed and that about a minute after reversing the Virginian heard the danger signal from the approaching vessel and gave three whistles to signify that his engines were going full speed astern. Less than a minute thereafter the vessels came into collision.

On this state of facts, and on the findings of the court that the lights of the Strathalbyn were in fact inefficient and obscured and not in compliance with the regulations, it is clearly apparent that the primary and causative fault for the collision was in the failure of the Strathalbyn to exhibit the character of lights as required by Article 2, Rule (a), (b) and (c), and so placed as required by this Article that by means of same her position would be made known to approaching vessels.

> "The Royal Arch was improperly navigated, in that she did not have her regulation side-lights, and especially her green light, properly and brightly

burning, and for that reason she was the sole culpable cause of the collision. * * * It was the duty of the Nellie Flloyd to avoid the Royal Arch, but she was relieved from such duty by the failure of the Royal Arch to exhibit any light which those on the Nellie Flloyd could see before the collision; and their ignorance of the course of the Royal Arch, until it was too late for the Nellie Flloyd to do anything to avoid the collision, was excusable and was produced by such fault of the Royal Arch.

The Royal Arch, 22 Fed. 457.

"The want of a red light was primarily the whole cause of the collision. The other vessel was deceived and misled by this failure to show that light.

The Mary Lord, 26 Fed. 862.

"The purpose of lights is to be seen; if they do not fulfill that office to ordinary observation the vessel must be held at fault.

The Amboy, 22 Fed. 555.

"The Carib (sailing vessel) was grossly in fault for so arranging her lights and sails that upon occasions such as this there would be a considerable field of obscuration on one or both sides of her stem. * * * The faults of the Carib being thus primary, obvious and inexcusable, the evidence to establish fault on the part of the Iberia (steamer) must be clear and convincing in order to make out a case for apportionment.

The Iberia, 123 Fed. 865. (Circuit Court of Appeals.)"

It is further manifest under the established rules as laid down in the above cases that to establish a fault on the part of the Virginian it must be clearly shown that that vessel was guilty of a breach of violation of one or more of the Rules of the Road, and that with positive knowledge of an impending and immediate

danger those in charge of her navigation failed to act upon such knowledge.

The only information in possession of those in charge of the navigation of the Virginian was that a vessel had exchanged a one-blast signal with the Flyer, which was ahead of them, and that a further signal of one blast had been blown by such vessel.

Under the Inland Rules, Article 18, a one blast signal may indicate one of the following conditions:

First. The desire of an overtaking vessel to pass on the starboard side of an overtaken vessel.

Second. As between vessels approaching on opposite courses it indicates that the positions of the vessels in relation to each other are such that a port to port passing is the proper maneuver, and a desire to so pass.

Under Article 18, to make a port to port passing a proper maneuver the vessels must be meeting head and head, or nearly so, or their courses must be so far on the port of each other that they will pass clear. This Article distinctly provides:

> "But if the courses of such vessels are so far on the starboard of each other so as not to be considered as to be meeting head and head"

a signal of two blasts and a starboard to starboard passing is required.

What, then, was the Virginian to understand from the one blast signal?

She could understand that a vessel ahead was asking permission to pass another vessel, and such an understanding would be quite justified in the absence of

lights. Although unable to account for the absence of lights or to locate the signalling vessel, but assuming either properly or improperly that this one blast signal was probably intended for themselves and coming from a vessel approaching on opposite courses and desiring to pass port to port, what further information was the Virginian entitled to draw from the one blast signal?

She was certainly entitled and bound to assume that the signalling vessel was obeying the collision regulations (*Belden v. Chase,* supra) and that her signal properly indicated the situation that the vessels were either on courses which would carry them clear port to port, or were approaching head and head or nearly so, in either of which situations, if the signal was given timely and the approaching vessel, as indicated by her signal she was doing, altered her course for a port to port passing, no danger of collision could be anticipated by the Virginian, especially when by stopping her engines, as she did, the approaching vessel would be given further time in which to maneuver as indicated.

Under Article 18 (Inland Rules) the signal of one blast as between vessels approaching on opposite courses can only indicate one or the other of these positions. It is therefore manifest that the hearing of a signal of one blast ahead, even though unable to locate the vessel so signalling, could not indicate to the Virginian a known and positive danger of collision, which would put upon her the burden of giving the danger signal. On the contrary, such signals indicated that the approaching vessel with full knowledge of the po-

sition and course of the Virginian had elected as a safe maneuver a port to port passing, and which the Virginian in the absence of knowledge of danger could only assume was a safe one. The Virginian was, therefore, fully justified, even in the absence of an ability to locate the approaching vessel to assume from the one blast signal the positions of the vessels to be such that they would pass clear.

Most certainly if any danger of collision existed, such danger was fully known to those in charge of the navigation of the Strathalbyn, and was not known to the Virginian, and the Strathalbyn, being in a position to observe every movement of the Virginian, was under the duty and obligation, if danger existed, to so indicate by the proper signals. The Virginian was further entitled to rely upon such signals being given if danger existed.

It is therefore submitted that the Virginian's pilot acted under compulsion of the rules and decisions when he navigated his vessel up to the second whistle of the Strathalbyn, on the theory that the Strathalbyn's movements did not involve collision, rather than on the theory that there was danger ab initio requiring immediate reversing.

The Failure to Apply the Major and Minor Fault Rule.

Viewing the decision of this court from another angle: The court said:

> "It seems too clear to require discussion that the Virginian was in fault in proceeding on her

> course and in not stopping and reversing her engines sooner than she did after hearing the signals of the Strathalbyn and in not giving a danger signal. As to the contributory fault of the Strathalbyn the evidence is conflicting."

It is submitted that the finding of the actions of the Virginian as the primary fault, and the failure of the Strathalbyn to carry proper lights as the contributing fault, is such an extreme misapplication of the law of causation as to be indisputable on a clear consideration of the facts involved.

The carrying of proper and efficient lights at night by which the position and course of a vessel is made known to other approaching vessels is one of the first and fundamental of the collision regulations. Its importance is shown by the fact that the first fourteen articles of the collision regulations are exclusively devoted to the subject of lights, describing in the most minute detail the character of lights to be used and how such lights are to be placed or located.

The failure to carry such proper lights as required by the Rules, or the obscuration of such lights, as has been found by the court to have existed in the case of the Strathalbyn, has been pointed out in the cases cited above to be, and is a major fault of the most gross and violent character.

When leaving Tacoma, the master and pilot of the Strathalbyn were charged with knowledge of the fact that practically every vessel to be met on their voyage up the Sound would come on a course directly opposite to their own and would probably be within the range in which their side lights were obscured. Every pass-

ing signal blown by the Strathalbyn would under such conditions be an invitation to a collision.

The fault of the Strathalbyn was not only primary in time, but primary in causative liability. It would initiate at the beginning of every maneuver a chain of misunderstandings which would be broken only when the vessels were in extremis, for it is only when a vessel coming head on is in the closest proximity to the Strathalbyn that she would become undeceived.

It is beyond our comprehension to understand how such a gross violation of one of the most important and fundamental Rules of the Road as this could under any theory of fact or law be termed a mere contributory fault. In view of the lower court's clear holding that the Strathalbyn's inefficient and obscured lights were the primary cause, the language of this court is still more inexplicable.

> "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such vessel should be resolved in its favor."
>
> *Alexandre v. Machan* (The City of New York), 147 U. S. 72, at 85. (Cited with approval in the case of *The Ludvig Holberg,* 157 U. S. 60, at 71).

"As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing, in order to make a case for apportionment. The burden of proof is upon each vessel to establish a fault on the part of the other.

"The recognized doctrine is thus stated by Mr. Justice Brown, in The Umbria, 166 U. S. 404, 409:

" 'Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in the City of New York (Alexandre v. Machan), 147 U. S. 72, 85 (37: 84, 90) and the Ludvig Holberg, 157 U. S. 60, 71 (39: 620, 624), that any doubts regarding the management of the other vessel, or the contribution of her fault, if any, to the collision, should be resolved in her favor.' "

The Victory-The Plymothian, 168 U. S. 410, 430.

It is therefore submitted that in view of the recklessness and total disregard of the collision regulations with which the steamer Strathalbyn was being navigated, with her lights in a dim and inefficient condition, and with her side lights so obscured that they were not visible from directly ahead, it is, as stated by the Supreme Court in *The City of New York,* supra, no more than just that any reasonable doubt with regard to the propriety of the conduct of the Virginian should be resolved in her favor.

This supplemental brief is offered from one whose fresher connection with the litigation may enable him to see the effect of the opinions more clearly, and present these considerations from a different viewpoint.

We trust that it will be of real assistance to the court in preventing the permanent establishing of a principle in this circuit at least, which he feels is really dangerous to navigation.

Dated, San Francisco,
July 20, 1916.

Respectfully submitted,

WILLIAM DENMAN,
DENMAN AND ARNOLD,
Of Counsel.